Book Reviews

ROMAN LAW IN MODERN PRACTICE. By James Mackintosh. Edinburgh, 1934. (Tagore Law Lectures, 1933) pp. xii, 202.

EVIDENTLY if the University of Calcutta desired to have the Civil Law presented to its students by men of English speech, Scotland was the country in which such men were to be found and Professor Mackintosh almost the ideal man for their purpose. Such eminent English Romanists as Buckland, de Zulueta and Golowicz will probably be thought of primarily as historians of law, but Professor Mackintosh has been an active practitioner, a K. C. and a former Sheriff of Ross. The Civil Law is for him an existing and living system and it is such a system which he proposes to set before his readers and hearers.

He does so by a succinct and clear account of the growth of the Roman law and its spread through Europe, and in this exposition he makes frequent reference to the parallel developments in English law. This is followed by an account of selected points in the law of persons, property, succession, tort and contract. The selection is made to depend on cases in English and Scots law in which the Roman law was used either to justify or determine the decision.

He found there were so many of these cases that a choice had to be made. Some eighty cases are cited in his table, most of them from the nineteenth century, but others quite recent in date, including one of 1931. A large number are from Scotland, where we are not much surprised to see Roman citations, or from the Privy Council, where, of course, one system of law is no more outlandish than another. But there are enough English ones to justify his thesis that for many situations in modern Common Law practice, reference to Romanistic example stands on a different footing from dragging in the Code of Hammurabi or entertaining the court with a few curious and interesting parallels in the customs of the ancient Chinese.

Professor Mackintosh is not attempting to evaluate the contribution of the Roman Law to the development of the Common Law, although he briefly sketches that subject. To know just how much there is in the Common Law that is Roman will need a new examination, when we have recovered the balance disturbed by the dogmatic Romanism of the Natural Law period and the equally dogmatic Germanism of the nineteenth century, a disease from which even the great Maitland was not quite free. But whatever may turn out to be the debt of the King's Courts to Bologna and Toulouse, Professor Mackintosh is concerned chiefly with the part the vast juristic experience of Rome may still play in solving problems that face the courts now.

I think this little book might convince the most headstrong Common-lawyer that Roman illustrations—especially in such branches of the law as easements, succession, quasi-contracts—are not a mere parade of learning which the court will receive with a bored deference, but may make the difference between winning a case and losing it. It is curious to note how frequently the most precious technique of the Common Law, the ingenious distinction, can take the form of showing that an apparently authoritative case or doctrine of the Common Law is based on the Roman Law, but on the Roman law misunderstood. For this we may cite Denman's judgment in Mason v. Hill, discussed at pp. 132-134. And apparently we are not committed to stand by these misunderstandings or on them, since we have frequently adopted—once more from Rome—the principle, *ratione legis cessante, cessat ipsa lex.*

What Professor Mackintosh has said about the law of England applies much more strongly to the law of the United States. Professor Kocourek of Northwestern long ago began a collection of American cases in which the Roman law has been cited.

It is a pity they were never made available and it may be that this book will hasten their publication. In the United States, the early nineteeth century judges were not at all certain that Roman precedents were much less authoritative for them than English ones. They spoke freely and confidently of Natural law, and they took that Natural law from strongly Romanized manuals. They were much occupied with mercantile and maritime questions where, despite Brougham's characteristic mistatement, the Roman law—in this case, the Roman law filtered through the waters of Barcelona and Oléron—kept recurring in phrase and substance. It was only later that it became a mark of hard-headedness to be contemptuous of any authority not found in reported English or American cases, and in these cases to ignore the not infrequent reference found there to Roman models or sources. That jactitation of indifference which medieval civilians brought to the Greek passages in the Corpus Juris—*Graeca non leguntur*—was repeated in the *Romana negliguntur* of much more modern practice. And in both instances the attitude was merely the defense mechanism of ignorance.

If we need specific instances, we may note that American courts are less uncompromising than English in their attitude to the *negotiorum gestio*. Lord Justice Bowen, even in the "urbane atmosphere of the Court of Admiralty" (p. 192), was of the opinion that: "Liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit on a man against his will." The point, of course, is that the Roman Law discovered long ago that this is precisely what you could do and often actually did. And after a long dominance of that species of British individualism which allowed a man to pocket the profit and decline the responsibility, American courts are discovering over again that this will really not quite do. And if it will soothe the shade of Lord Justice Bowen, it might be well to remark, that if the act was definitely and clearly against the will of the beneficiary, it created no obligation on him. In all this Mr. Edward Hope's article on Officiousness in 15 Cornell Law Quarterly 25-53; 205-242, may profitably be consulted.

Similarly, a real understanding of the Roman doctrine of negligence (p. 16) might relieve us of the three "degrees of negligence" which the Common Law took from the Civil Law of the Renaissance. And difficult as the doctrine of *error* is at Roman Law (pp. 175-188) it is at least free from the bogs of "unilateral" and "mutual" mistake in which so many successive generations of Common-lawyers persist quite unnecessarily in floundering.

One or two points, perhaps, deserve special comment. The discussion of legitimation *per subsequens matrimonium* is somewhat misleading. The children were not merely "natural" afterwards (p. 111) but fully legitimate. One might add to Professor Mackintosh's statement on p. 117, that the English isolation in this celebrated controversy was not quite so complete as it has often been made out to be. The rule fully legitimating such children by subsequent marriage was general all over Europe for feudal land as distinguished from allodial land. Fleta says (1. 15, 3) that even in England such legitimates succeeded to chattels. At any rate the decretal of Alexander III, the famous Magister Rolandus, (c. 6 X, 4, 17) apparently recognizes a canon rule and does not profess to innovate. In Glanvil, the divergence between the canons and English practice (vii, 15) is treated as well-established. It is likewise noteworthy that many of the decretals on this subject are in the form of letters addressed to English prelates.

To those who profess to hate history and to whom comparative law merely demonstrates how queerly foreigners act when deprived of the guidance of the Common Law, it will be idle to commend a careful reading of Professor Mackintosh's book. To all others, the ideas suggested here might carry us far into plans for a reformed curriculum of legal education. That such a curriculum would find room somewhere for an elementary knowledge of the Roman law, would almost be inevitable. When

we remember that Coke who poured a generously ample bile upon all Civilians, would have regarded a lawyer who had never read the Institutes of Justinian—in Latin—as little better than illiterate, that Sir Matthew Hale who thought the Common Law all but perfect, put Roman law in an important place in his scheme of legal training, we may well wonder why the Common Law should seem to be best applied by men who industriously avoid a known part of the intellectual background of those who made the law.

But the real basis for the study of Roman law in our law schools is the one implicit in Professor Mackintosh's book. The Roman law was a highly sophisticated system with a long history of application to enormously diverse conditions and times. It was worked out by acute and profound thinkers. It stubbed its toes on many of our theoretical and practical difficulties and it overcame some of them. Its very deficiencies are illuminating, since its blunders are not quite coterminous with ours.

And as a matter of sheer method, it is not without advantage to force ourselves to reclassify our legal terms in a system so like our own that the reclassification is possible and so different that it requires thought to make it. Law students to whom words like "contracts" and "torts" and "agency" and "corporation" have almost the solid heft of tangible and ponderable things are much in need of a discipline which makes these terms seem just what they are, unsubstantial and shifting categories that, for convenience of exposition and for no other reason, frame the only reality of the law, to-wit, human beings and their purposeful activities.

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CASES ON INTERNATIONAL LAW. By Charles G. Fenwick. Chicago: Callaghan & Company, 1935, pp. xxiii, 815.

THE basis of an abiding law, which controls the rights and duties of nations in their relationships with one another, is experience. Many international treaties simply restate international customary law. As with municipal common law, so with international law, the case is the significant thing. Through the medium of the recorded case, the conflicting interests of the litigants are described and the principles of law applied by the court to arrive at a pacific solution are exponded, under the restraint of judicial responsibility.

The scientific study of international law was retarded for many years by the text writers, who failed to perceive the necessity of making readily available to the student one of the principal sources of international law. While the authors of numerous and at times ponderous treatises on the law of nations relied on cases to analyze and systematize the subject, they were content to let the sources of their information remain in the background or in footnote references to cases, the texts of which were for the most part unavailable to the student. The experience of most lawyers does not throw them into contact with the actualities of international conflicting interests. Text writers, without mentioning the fact, have frequently departed from the practice of nations and expressed wishful views on what the law ought to be. The consequence was that the legal profession for many years viewed international law with a skeptical eye. It was not taught in law schools and the practitioner knew very little, if anything, about this field of public law.

Pitt Cobbett realized the need for a realistic approach to international law in 1885 when his first edition of Leading Cases and Opinions on International Law was published. Cobbett, however, summarized the opinions of courts, rather than reprinting

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the original texts. He added splendid notes and references to standard text writers to explain the principal points of cases. The value of his contribution to the study of international law is demonstrated by the appearance of a fifth edition of his casebook in 1931 by Francis Temple Grey.

In 1893 Freeman Snow prepared a book of Cases and Opinions on International Law, giving "the exact language of the judges" who wrote the opinions, rather than a paraphrased summary. Professor Fenwick has wisely followed this precedent, with the explanation that the student should read the case in the light of the particular facts before the court, "much harm being done by quotations out of their context." The practitioner would do well to observe this advice.

Professor Fenwick has arranged the cases in his book under twenty-two chapter headings, with numerous subheadings. He has placed at the beginning of each chapter subdivision an introductory note, the purpose of which is to direct the student's attention to the principal points in the succeeding cases which it is desired to emphasize. There are approximately one hundred and eighty-five leading cases reprinted in the book. Numerous cases are referred to in explanatory footnotes.

This casebook appears to be very well suited for use in an introductory college course in international law. It is not, however, believed that it contains sufficient material for an intensive law school course on this subject. In this connection it should be recalled that international law is in a sense a curriculum in itself. It is a *corpus juris* of the rights and duties of the state and not comparable to a single subject in private law.

For the purpose of giving an advanced law school course in international law, it may be hoped that a case book will be prepared which contains even more material than that set forth in Hudson's Cases on International Law, published in 1929. It is possible that future editors of casebooks on international law will consider the preparation of a separate volume on the law of nationality, insofar as it expounds municipal law, as distinguished from international law. The international law of war, while treated briefly in Professor Fenwick's case book, deserves much more extensive treatment for the advanced law school student. A separate volume of cases on the international law of war is indicated, if this part of the subject is to be systematically dealt with.

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MECHEM CASES ON PARNERSHIP, Fifth Edition by Robert Elden Mathews. Chicago: Callaghan and Company. 1935. pp. xix, 812.

IN examining and attempting to evaluate any human institution, such as legal education in general, or a casebook in particular, due regard must be paid to the surrounding circumstances. We venture to borrow a more colorful, and perhaps impressive term, from the popular writings of a legal realist, viz. "the facts of life."[1]

One fact of life, for proof of which we cite the same realist as authority,[2] is that persons who plan the content and arrangement of law school curricula do not have the advantage of knowing what law school graduates are doing to such a degree of

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1. K. N. Llewellyn, "Legal Brakes for Political Machines," New York Times Magazine, Oct. 27, 1935.

2. K. N. Llewellyn, *On What is Wrong With So-Called Legal Education*, (1935) 35 COL. L. REV. 651, 655, 667.

accuracy that production of legal scholarship can be made to fit the demands of the practice of law. Lawyers and law teachers are recognizing this fact and in some localities factual investigations are being made. Consumer demands have been recognized in some instances. As Llewellyn says, "The Times do press." New Deal Legislation has received attention, and will receive greater prominence as the law teachers who have been temporarily engaged in its administration return to their classrooms. Another outstanding fact of life which has affected law school curricula in recent years is that some law school graduates, usually the more competent, on the basis of their law school records, have become corporation counsel, or to use a more colorful term, Wall Street Lawyers. This branch of the profession has been recently described and its social significance appraised by another realistic commentator on the current scene, Harold J. Laski.[3] The Wall Street Lawyer, or as one of them modestly characterized himself, the "scrivener of corporate mortgages,"[4] finds that his practice in connection with security issues, mergers, reorganizations, etc., involves him in problems for which the law school courses in corporation law as they were presented down to a decade ago furnish only the most elementary preparation. This situation has been brought to the attention of the law schools from several sources, among which may be mentioned the obvious needs of the more conspicuous graduates of the larger university law schools, the participation of corporate lawyers in the teaching profession, and the impact of the schools of business administration.[5] The result has been a reorganization of the curricula of many schools.

Courses formerly known as Corporations and Partnership have been combined under the title of "Business Units," "Business Associations," or "Business Organizations." Sometimes Agency has been included. In the process less attention is given to partnership law and more attention to problems of corporation law of interest to the prospective counsel for the investment banker. This raises two questions in the mind of one who has taught both Corporations and Partnership. Is Partnership given the amount of attention which it should receive in the light of the interests of the prospective practitioner? Is the consideration of Partnership problems along with somewhat analogous problems of Corporation Law an effective way to teach these two subjects?

What attention Partnership should receive from the practical standpoint of preparing for the practice of law depends in the main upon the amount of legal business provided by partnerships. This is a factual problem to which no one has an accurate answer. The Wall Street Lawyer is associated with a law partnership. His clients may include partnerships or limited partnerships of investment bankers or security dealers. He may have to deal with the security issues or other transactions of organizations which constitute variations of partnerships, such as joint stock companies and business trusts. Aside from that he has no use for Partnership Law, save as it may have some bearing by way of analogy on Corporation Law, the possibility of which will be noted later. But whatever may be the significance and importance of corporation lawyers it must be recognized that not all graduates of law schools, not even the majority of graduates become members of that professional group. Probably the bulk of the profession whose business might be classified as commercial are concerned more with problems arising out of production and distribution than with

3. "The Decline of the Professions," Harpers Magazine, November 1935.

4. Joseph V. Kline, reviewing DOUGLAS AND SHANKS, CASES AND MATERIALS ON CORPORATE REORGANIZATION (1932) 41 YALE L. J. 1255.

5. Review of DOUGLAS AND SHANKS, CASES ON CORPORATE REORGANIZATION by Arthur Stone Dewing of the Harvard Graduate School of Business Administration (1932) 45 HARV. L. REV. 1138.

corporate financing and reorganization. To what extent the business organizations involved are partnerships or will be in the future, no one accurately knows. It may be that the growing burdens of taxation and filing of returns imposed upon corporations, as described by Mathews in the casebook we are reviewing (pp. 507-512) may lead smaller business groups to prefer partnership to incorporation. Perhaps some notice should be taken of the apparent opinions of bar examiners who continue to include partnership questions in bar examinations. In any event, some factual study should be made of the needs of the average graduate of the particular law school, and an effort made to meet his needs in curricula readjustments.

The writer has examined some of the recent casebooks with a view to the amount of partnership material. FREY'S CASES AND STATUTES ON BUSINESS ASSOCIATIONS. (Callaghan & Co., 1935, pp. 1213) is designed for use in a course covering six semester hours, about one sixth of which would be devoted to partnerships. Many of the problems usually covered in Partnership courses are included. The index does not list partnership material separately. The book does not appear to include anything on incoming partners, sub-partnerships, capacity to be a partner, remedies of partners for breach of their mutual obligations, partnership as distinguished from separate property, distribution of estates of insolvent partners. The latter topic is left to another course, such as Creditors' Rights. The editor appears to have generally confined himself to such partnership problems as may be said to resemble corporate problems.

Douglas and Shanks in the two volumes of their series on Business Units entitled LOSSES, LIABILITIES AND ASSETS, AND MANAGEMENT, appear to have included all of the problems which would ordinarily be dealt with in a partnership case book. The part entitled *Losses, Part III, Distribution of Losses and Assets, Chapter 1, As Between Creditors,* is an especially effective example of the functional arrangement of material. In this chapter are included cases and notes on what is separate or partnership property, respective rights of firm and separate creditors in distribution of the insolvent separate estate, priorities of creditors in the situation of partnership by estoppel, double proof by partnership creditors, judgment liens by partnership creditors on separate property, fraudulent conveyances of firm property, assignments by partners of their interests and the effect thereof on firm creditors.

Magill and Hamilton, in their CASES ON BUSINESS ORGANIZATION (West Publishing Co. 1935 pp. 1349) have attempted to cover in one volume the formation, operation as going concerns, and solvent dissolution of corporations, partnerships and allied business units. Aside from insolvent dissolution the book appears to cover the usual topics of Partnership Law with leading cases, notes and extracts from the Partnership Acts.

These books all have the merit of forcing the student of Corporation Law to learn something of partnerships, which is doubtless an improvement on the situation formerly existing in some law schools, where Partnerships and Corporations were separately given as elective courses and students to a considerable degree failed to elect Partnership. Whether the use of such books will result in imparting to the student a proper and adequate understanding of Partnership Law, whatever that may be, will depend on the capacity, interests and diligence of the instructor as well as of the students. In all of these books the arrangement is that of assembling under a particular topic, such as nature and formation of associations, creations of claims, control or management, groups of cases concerning the different types of organization. Topics are not of the same relative importance. Because of the comparatively short duration of partnerships and the factor of personal liability, it seems that dissolution of solvent and insolvent partnerships is of more importance and interest to the average lawyer than reorganization of corporations. In the writer's judgment the

contrasts are more numerous than the resemblances or analogies. Whether that makes segregation or parallel treatment preferable is a pedagogical question, the answer to which must be determined by experience.

In view of the writer's preference for segregation of Partnership Law he welcomes the appearance of a new edition of Mechem's Cases. The book has several individual characteristics. The case material is a blending of new and old, properly relegating, in our opinion, *Waugh v. Carver* to a footnote. Footnote is probably not the correct word, but rather editorial comment printed in readable type as a part of the main body of the text. The editor has frequently taken measures to intrigue the reader by stating a problem of interest, followed by a citation in lieu of solution. The most interesting feature of the book is the arrangement. In his preface the editor indicates his preference for a functional, rather than a conceptual approach. However, he adopts teachableness as his criterion, and admits the difficulty of being entirely loyal to any plan. Order of arrangement is after all not an end in itself. The object should be the presentation of the material in an interesting and understandable way.

Sometimes it seems that the functionalists are shooting at a straw man of their own creation. It seems to be assumed that the user of a casebook which starts out with a collection of cases involving the problem of whether a group is a partnership or not, the cases being arranged according to their factual similarities, without regard to why the problem was raised in the particular cases, must be held to overlook the functional significance of partnership. Whether an association is a partnership is, in the majority of cases, significant for its bearing on what persons are individually liable for the debts of a business. It is also significant for other reasons, such as the obligations between the associates and remedies for their breach, the incidence of property and income taxation, whether co-debtors are subject to bankruptcy proceedings as a group unit, or whether a creditor of an associate may levy execution directly on the joint property. It seems highly improbable that a casebook editor would delete from the opinions printed all reference to why it was necessary to decide whether an association was a partnership or not, or that an instructor would allow his class to overlook it. To include in a collection of cases on indicia of partnership, only cases in which there was an attempt by a creditor to charge an associate for the debts of the business as Mathews purports to do, or to have such cases in one part of the book, while cases arising as between the associates which turn on the existence of partnership are in another part, as in Clark and Douglas's Cases on Partnership, may be logically justifiable differentiation, but it does not appear to be necessary for a functional presentation of the partnership form of business association.

The difficulty of being consistent in one's organization of material appears in Mathews' inclusion of a group of cases on Partnership Goodwill in Part III, which is entitled *Application of Assets to the Claims of Creditors.* All of the cases arise out of some controversy between the partners or their representatives, and some of them are concerned with the matter of the right to compete with one another after dissolution.

However, users of the book will probably not be inclined to pay too much attention to tables of contents and chapter headings. The arrangement is in our opinion one which will make the subject matter interesting and understandable. The arrangement and the editorial comment, as well as the selection of cases, shows a considerable amount of thought and industry of the editor, which will be appreciated by those members of the teaching profession who are still interested in the law of partnership.

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LAW AND THE LAWYERS. By Edward S. Robinson. The Macmillan Co. 1935. pp. xi, 323.

IN the hospitable environment of Yale Law School a distinguished academic psychologist has grappled with problems, colleagues and students until his verbal sequences about law and psychology have arranged themselves in plausible and ingratiating order. The result, fixed in print, is now thrown to the barbarians beyond the gates.

Professor Robinson contends on behalf of a naturalistic (realistic) jurisprudence, predicts certain advantageous consequences to follow from it, and discusses the ways and means by which psychology can contribute to it.

He calls for an account of legal philosophies "in the same objective spirit as that in which we describe the myths of primitive peoples." In the same spirit he proposes to study the opinions of judges, the behavior of counsel and witness, the newspaper reading public, the litigants and the legislators.

From this naturalistic program certain results, conceived to be advantages, are predicted to follow. Judges will make "plain admission of actual policy" (p. 321). "If judges have evolved techniques of avoiding the principle of *stare decisis*, let those techniques be spread as frankly upon the law books as are the principles themselves" (p. 320). "A naturalistic philosophy of law will help men to accept some valid facts about legal behavior and the legal institutions to which they are inclined to close their eyes" (p. 320).

Psychology is invoked as a tool in the path to naturalism. The jurist is told to be of good cheer despite the winds of contrary doctrine in the cave of psychology because "there has existed an attitude of inquiry (in psychology) able to survive its own mistakes" (p. 99). The jurist is counselled to "throw himself into psychology completely enough to become his own competent critic on matters of psychological theory" (p. 111).

The psychologically equipped person will want to investigate the "factual importance" of certain distinctions whose significance has been greatly stressed in the past controversies of legal philosophy. He will compare the objective consequences of "codes" or "cases," of appeals to "natural law," and of "fictions" and "legalisms."

He will also seek to disentangle the "felt difficulty and the problem as formally defined" in the decision (p. 197). In the course of a suggestive discussion, Professor Robinson names certain criteria for the discovery of occasions when this discrepancy is great. One indication is the resort to "statements more relevant to a general issue of fairness than to the judicial definition of the case" (p. 197). Another is the case in which the defendent has exceptional notoriety. There is also the "queer decision". And "When the court speaks of a question of breach of contract as reducible to the issue of intent of the parties, we may be fairly sure that something other than intent is involved" (pp 197ff.).

Throughout the book the style is swift, simple and quotable. Thus, "A doctrine like pragmatism makes it possible for judges to glory a bit in their violation of precedent and renders it less necessary for them to dress every legal innovation in the costume of an old settler" (p. 281).

Plainly Professor Robinson has produced an excellent treatment of a timely theme. Without pausing to develop the constructive side of his work any further, it may not be amiss to enter certain reservations upon the enterprise as a whole.

(1) Skill in naturalistic analysis does not necessarily lead to the consequences foreseen, and preferred, by Professor Robinson. A naturalistically equipped élite will not necessarily use candor in talking to anybody but itself. A full and free confession of intent to all the world is no necessary outcome of insight. Professor Robinson would like to have new knowledge used for "social adjustment", which he undertakes

to define. Few Americans will prefer anything else, in general; but there is abundant reason for predicting that more knowedge does not invariably generate goodness, if goodness is to blunt the cutting edge of social conflict. The use to be made of knowledge depends upon the system of preferences about élite relationships which may be adopted by particular jurists and juristic schools in varying contexts of power relationships.

(2) Although psychology has no monopoly of naturalism, the *relative* contribution of psychology is not examined. Professor Robinson does not clearly distinguish between "psychologists" and other social scientists who share the naturalistic approach; hence there is no sharp comparison of the relative efficiency of "psychology" as a contributor to naturalistic jurisprudence. The frame of reference of the term "psychology" is left free and floating, like an expansible and contractible balloon, and words like "anthropology", "political science", "economics" and "sociology" are left in the vague.

(3) The technical creativeness of psychology is under-emphasized by the specific mode of presentation adopted by Professor Robinson. By emphasizing words of general reference, like "compensation", and by restricting attention to the language of legal philosophers and judges, the impression is left that psychology is just another word system. Now any vocabulary needs to be construed with reference to the characteristic focus of attention of the speaker, and "psychologists", as I understand the word, have invented several new ways of focussing attention upon events. Legal events can be observed by prolonged free association interviews, by life history interviews, by diary note observation, and by several related procedures which promise to enrich the data traditionally at hand for analysis. The language of "psychologists" often makes sense, and sense of importance for "naturalistic jurisprudence", when rigidly interpreted with reference to the observational standpoint of the psychologist in question. Professor Robinson is quite aware of all this, but this particular book suffers from a diffuseness of presentation which suggests that psychology simply contributes another argument to a field where Professor Robinson himself wants to contribute something more.

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CORPORATION LAW FOR OFFICERS AND DIRECTORS. William J. Grange. The Ronald Press Company. 1935. Pp. iii, 904.

THIS review has been written from the point of view of the business executive, and the guidance which he may expect to derive from the book; the reviewer is not competent to say with what *legal* accuracy or finality the rules of conduct for business managers are laid down. The review editor apparently has considered it not inappropriate that a book addressed to laymen should be reviewed by a layman.

The general structure and contents of the book may be summarized in simple fashion. Of approximately 900 pages, 675 are text, 200 pages are forms and model drafts, and 40 pages are indices. Among the 50 chapters the largest groups are seven chapters relating to by-laws, ten chapters relating to stock, six chapters dealing with the rights, liabilities and activities of stockholders, five chapters treating of directors and their doings, and four discuss the manner and conditions under which a company may be transformed or terminated in insolvency, bankruptcy, reorganization and dissolution. Other matters dealt with include dividends, management policies, officers and employees and their relations with the corporation, the corpora-

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tion's business in states other than the state of its domicile, bonds, taxation and mergers.

The preface promises that the book shall be a guide for corporation officers in their customary transactions, that it will deal with these matters in a philosophic spirit so that men may understand the underlying principles, that it will be up to date as to the new deal legislation in the appropriate places; it expresses the hope that the book may also be of service to the practicing lawyer, especially since it cites the leading case authorities on the points handled. All of these promises appear to be reasonably well discharged, and the corporation official is put on notice with respect to most of the legal problems which may beset his path. Probably he can rely with some assurance on those parts of the book dealing with matters on which legal adjudication has settled down to a fairly definite pattern, but on subjects like the new deal legislation the author has necessarily had to confine himself to bare summaries of such matters as the Securities Act and the Securities Exchange Act (in chapters dealing with the issue and sale of securities), and of the Bankruptcy Act of 1934. No treatise could yet be very final on the manner in which this legislation is being administratively applied.

That the book is a law book, with a legal emphasis, and not a book on business management by a manager, appears in many ways. On the very first page occurs the well known passage from Chief Justice Marshall describing the characteristics of a corporation, including the fact that "among the most important are immortality. . . ." The meaning of this is evidently that, so far as the law is concerned, a corporation has permission to be immortal; but so far as the management is concerned their chief problem may be said to be that of making that immortality real. The narrative goes on to say that Marshall's definition does not sufficiently recognize the men who make the corporation, and brings in Chancellor Kent to supply the lack. The Chancellor indeed refers specifically to these men and describes them as being "vested, by the policy of the law, with the capacity of perpetual succession," which still leaves them the job of finding out how to keep the ship afloat in perpetuity.

The discussion of the meaning of capital (p. 112 ff.) will scarcely reduce the confusion surrounding the use of that term. The author defines capital "in the broader sense of the term, as made up in the first instance of the money or other property contributed by the stockholders." Capital "in a narrower sense, as in the phrase 'capital and surplus,' . . . denotes that portion of the corporate assets which is legally segregated or fixed in the corporate business, so that it cannot lawfully be withdrawn for distribution among the stockholders." From these definitions it is impossible to discover any difference between capital in the broader sense and capital in the narrower sense. The real distinctions to be observed with respect to capital are (1) the actual physical things which make up capital, the capital goods as they are termed by economists; this is capital "in the broader sense" since it includes all capital, whatever its origin, and whoever now has the equities in it; (2) the capital stock item in the balance sheet representing the source of "the money or other property contributed by the stockholders to the corporate enterprise" and also as used in the phrase "capital and surplus." This is simply the owners' equity in the assets, and as such appears on the liabilities side of the balance sheet, the side which is supposed to display all the equities and is therefore governed very largely by legal considerations. The greatest havoc is caused by using these two concepts of capital indiscriminately, and this confusion is not dispelled when the ambiguous phrases are clothed with the authority of court citations. The expression "segregating assets" can refer only to the assets side of the balance sheet, where the different categories of assets are listed. But the balance sheet has yet to appear in which assets corresponding precisely with the capital stock have been segregated. All that this sort of language means is merely that the net worth of the company, as shown by the balance sheet as a whole, must not be less than the capital stock accounts when

dividends are paid, and the fulfilment of this proviso is indicated briefly by the presence of surplus in the balance sheet.

When the technical language peculiar to accounting is resorted to in this book, the statements made are sometimes directly erroneous. Twice in one paragraph (page 247) additions to property are "credited" to asset accounts, and a "capital improvement" is made a "charge to the expense account," albeit "offset by the credit to the asset account." Such a proceeding would fail any first year student in accounting. Similar results occur in the discussion of depreciation (page 246). "Depreciation fund" is not the equivalent to, nor a substitute for, "depreciation reserve." "Depreciation fund" can be used with propriety only with respect to an item on the assets side in a case where a separate fund has been appropriated to represent the "depreciation reserve," which will either appear on the liabilities side, or as a deduction on the assets side.

In the discussion of finding a market value for shares no explicit reference is made to earnings, unless this factor be included in the term "goodwill," which is mentioned. But both good will and the value of the shares of stock are dependent primarily upon earnings, and any exposition which omits that factor is incomplete. The exposition of stock dividends (page 237), on the other hand, is very effective, particularly on the point that, in certain very essential respects, a stock dividend is the exact opposite of a cash dividend, in that the former means that the stockholders will not now, or in the future, receive cash dividends from that part of the surplus which is being utilized for a stock dividend.

The appointment of outside auditors by the stockholders (page 292) is not in practice quite the effectively remedial measure which is sometimes supposed. Those who have had experience on both sides of the Atlantic are in some doubt as to which is the better, the English practice of election by stockholders, or the American practice of appointment by the officers of the corporation. A later reference to this point (page 466) seems to imply that there is no American equivalent for the auditors elected by stockholders under the English Companies Act; but most reputable American companies now have their outside auditors, and for purposes of statements under the Securities Act and the Exchange Act are required to do so. Moreover, in a few American companies the auditors are elected by the stockholders.

In a well-conceived society the law will regard itself as the ally of honest business, just as much as the monitor and judge of dishonest business. It will permit, and indeed help to fashion, the implements which belong to our good, as well as forbid those which are sinister and destructive. It is in this sense that the law has done well to approve the use of no-par value stock. The discussion of this topic (Chapter 22) follows traditional lines, including the contention that somehow a no-par figure is nearer to the "real worth" (page 227) of the stock than is a par-value. There is very little in this argument. The stated value of no-par stock is likely to be just as far away from "the real worth" as is a par value. On whatever basis the capital stock is stated in the books and balance sheet, par or no-par, it is not and never was intended to show "the real worth" of the stock of a going concern.

The effective reasons for the popularity of no-par value stock are in the author's second group (page 227), namely, in the convenience and flexibility which it affords the management in re-stating the company's position when occasion calls for it. But this is not an unmixed good, and lawyers who have labored so hard to throw up defenses around the integrity of capital, and made so many prohibitions against paying dividends other than out of genuine surplus (page 240), should be apprehensive about an elastic device which permits of the manufacture of surplus any time the directors feel inclined to re-state capital stock (page 244). This book conveys no hint of any legal restriction upon the freedom of the board to do so, and there should be none. Experience is not as yet sufficient to justify any generalized negations, but the matter will bear watching. There is much to be said in favor of giving the management this

freedom when it is honestly used, and requirements of full disclosure in reporting go a long way to insure that it shall be honestly used.

It seems likely that the recent legislation, the Securities Act and Securities Exchange Act, will result in greater legal recognition of the place of the accounts in law and in business. In the summaries of these acts their accounting requirements are brought out, but other parts of the book reflect the relative indifference to these matters which has hitherto prevailed in some quarters. There is little or no reference to them, for example, in the topics listed to be covered in stockholders' meetings (page 85), in the by-law provisions (page 104) or in the actual conduct of stockholders' meetings (Chapter 30). It is natural for a book of corporation law to be occupied with all the machinery by which their rights are secured to stockholders, but what they got when they bought their stock is indicated mainly in the annual financial statements. Here the directors and officers give an account of their stewardship, in order that the stockholders may judge whether they shall be stewards any longer.

The short paragraph on treasury stock (page 115) is in the nature of definition only, and gives no hint of the conflict existing between the legal conception of it, and the business or accounting conception; and no reference is made to the statutes of some states which restrict the acquisition of a company's own stock to the amount of its surplus. Such restrictions have some valid necessities in their favor, but at least they are intrinsically at war with the elasticity inherent in no-par value stock.

In the chapter dealing with the control of the corporation (Chapter 25) the various devices by which the holders of a minority of the stock may obtain and keep control of the corporation are described; and again the implication is conveyed of something sinister. Corporations are confronted with problems of government similar to those of countries, especially of so-called democracies. Any student of history or present day politics knows that the customary thing is that active minorities govern; what is more, it is practically impossible that majorities shall directly and effectively govern, first because majorities are not usually active, and second, because if they were they would pretty well destroy the enterprise by acting in different directions. We may as well get used to the idea of government by minorities, and while it is reasonable to throw up proper safeguards and limitations upon them, yet this should not go so far as to cripple the active conduct of business. This book refers constantly to the reluctance of the courts to set aside managerial acts, or to interfere with managerial policies, except upon clear proof of bad faith, and it would be more destructive than salutary for statutory enactments to rush in where the courts have feared to tread. The citation from Sir George Jessel (page 407) is sufficiently apropos to these times to justify its reproduction even in a review:

> "One must be very careful in administering the law of joint-stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account, and, on the other hand, should also do its best to allow honest men to act reasonably as directors."

Of the choice of policies, therefore, between regulation by specific and detailed statutory rules, and regulation by requiring public disclosure, the latter will in the end avail most, and be least harmful. And this is true whether the management be of the majority or of the minority in stock holdings. But even prescriptions for disclosure can "press hard on honest directors," and we are getting to the point where caution would be better than reckless advance.

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